STATE OF MICHIGAN

COURT OF APPEALS

MOLLY HARRIS-GORDON, Plaintiff-Appellant,	UNPUBLISHED September 26, 2006
v	No. 267136 Wayne Circuit Court
DAIMLERCHRYSLER CORPORATION, Defendant-Appellee.	LC No. 04-403561-CL

Before: Davis, P.J., and Murphy and Schuette, JJ.

PER CURIAM.

Plaintiff, Molly Harris-Gordon, appeals as of right the grant of summary disposition in favor of defendant, DaimlerChrysler Corporation, in this action alleging race discrimination and retaliatory discharge in violation of the Michigan Civil Rights Act, MCL 37.2201 *et seq.* We affirm.

I. FACTS

Plaintiff filed the instant employment discrimination action under the Michigan Civil Rights Act alleging race discrimination and, alternatively, retaliatory discharge because she had previously sued defendant for race discrimination and filed complaints with the Equal Employment Opportunity Commission and Michigan Department of Civil Rights.

Plaintiff claims that she previously filed charges of discrimination with the Equal Employment Opportunity Commission and the Michigan Department of Civil Rights. Defendant does not dispute this fact. Further, plaintiff filed an action against defendant in 2000, alleging Civil Rights Act violations on account of plaintiff's race, which was resolved by settlement in February 2002.

As part of the settlement, plaintiff was reinstated and permitted to take a short leave of absence before returning to work at Detroit Axle in April 2002. After plaintiff returned to work, she was cited for threatening a supervisor and for her involvement in a physical altercation with a coworker, Barshell Benford. Plaintiff alleges that defendant violated the Civil Rights Act because she was disciplined differently from other similarly situated employees who had also threatened supervisors and been involved in physical altercations at work.

In June 2002, plaintiff approached Area Manager Anthony Cavette, who was engaged in a conversation with another employee. When plaintiff interrupted the conversation, Cavette responded that he was busy and therefore could not converse at that time. Plaintiff believed that Cavette was being "rude," and she told him that she intended to "report him to corporate." Plaintiff claims that Cavette approached her later to inform her that he was putting her "on notice" for disciplinary action because she had threatened to report him. Plaintiff, however, was never disciplined for her encounter with Cavette. At her deposition, plaintiff explained why she believed that Cavette put her "on notice:"

> *A.* I believe he did it in retaliation to my filing the previous charge. And I truly believe that he was going to try to discipline and put me in the street, maybe to get brownie points or something from Chrysler because I had filed that previous lawsuit. He wants to discipline me for saying I'm going to call corporate?
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> *Q.* What evidence or information do you have, beyond your speculation about this, that Mr. Cavette was trying to do that to get brownie points?
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> *A.* I don't have any brownie – any evidence to show that he was doing it to get brownie points.
>
> *Q.* Okay.
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> *A.* I don't have evidence to show anything. All I know is it did not – it should not have happened.

On August 6, 2003, plaintiff was involved in a workplace fight with Benford during an overtime shift. Although defendant had authorized Benford to work overtime, plaintiff believed that Benford was not entitled to work overtime or choose among the overtime assignments because Benford did not have medical restrictions. Plaintiff and Benford began arguing, which escalated into a physical confrontation that had to be broken up by their coworkers.

Area Manager Jerald Davis responded to the incident. He claims that according to company procedure, he required both employees to complete a written account of what occurred before he sent both employees home for the night. Davis claims that he was not aware that plaintiff had filed a previous lawsuit.

On August 7, 2003, plaintiff and Benford separately met with Labor Relations Supervisor Robert Fokken for an interview. Fokken suspended plaintiff and Benford pending his investigation of the fight. Fokken then interviewed a number of plaintiff's coworkers who witnessed the event. The witnesses told Fokken that plaintiff and Benford had indeed had a physical altercation, in which plaintiff choked Benford and Benford attempted to punch plaintiff. Fokken concluded that this conduct violated defendant's Standards of Conduct No. 15 (which prohibits "fighting, horseplay, or other disorderly disruptive or unruly conduct") and No. 14 (which prohibits "threatening, intimidating, coercing, harassing, retaliating, or using abusive language to others"), and thus terminated both employees on August 18, 2003. Plaintiff admits that Fokken never mentioned her prior lawsuit.

On August 19, 2003, plaintiff's union, the UAW, filed discharge grievances on behalf of plaintiff and Benford. Both grievances proceeded through the "second step" of the grievance process by September 5, 2003, and were denied. Shortly thereafter, local negotiations at the plant slowed the third step of the grievance procedure until a new contract was reached in June 2004. Processing of the grievances was further slowed when Fokken left the plant and was not replaced for several months.

Shortly before the negotiations between the UAW and defendant were concluded in June 2004, there were over 100 termination grievances outstanding at Detroit Axle. Defendant and the UAW agreed to resolve outstanding grievances as a condition of concluding the local negotiations, by either allowing the employees to return to work or by withdrawing the grievances. As a result, approximately 50 terminated employees, including plaintiff and Benford, were allowed to return to work under a conditional reinstatement. Plaintiff returned to work on July 6, 2004. Notably, in 2004, approximately 90 employees were reinstated from termination. Many of the employees, like plaintiff, had to wait longer than ten months for reinstatement.

On February 6, 2004, plaintiff filed her complaint alleging violations of the Civil Rights Act for her wrongful termination. Specifically, plaintiff alleges that defendant "discriminated against [plaintiff] on account of her race, African-American, and retaliated against her for asserting her rights to be free of such discrimination, both of which violated the Elliot-Larsen Civil Rights Act." According to the Return of Service, however, plaintiff did not serve defendant's registered agent until April 27, 2004.

Defendant filed motions for summary disposition, arguing that plaintiff's claim should be dismissed on two independent, yet alternative grounds: (1) plaintiff failed to present sufficient evidence of discrimination based on race or retaliation, and (2) plaintiff's action was barred by the statute of limitations. After a hearing, the trial court granted defendant's motion. On December 12, 2005, plaintiff filed her claim of appeal.

II. MICHIGAN CIVIL RIGHTS ACT

Plaintiff argues that the trial court erred by granting summary disposition in favor of defendant. We disagree.

A. Standard of Review

Importantly, the trial court granted defendant's motion based on plaintiff's failure to provide evidence of wrongful termination, not the applicable limitations period. Specifically, the trial court held:

> Okay, in this case the Plaintiff got in a fight and was discharged. Others were discharged. The Corporation had a legitimate basis for discharge. There's no basis for a retaliation claim. The Court will grant the motion for summary disposition on that basis.

The order entered by the trial court reads:

> Defendant's Motion for Summary Disposition is granted. With respect to the retaliation claim in particular, the Court finds that Plaintiff was discharged for fighting. Defendant has discharged other employees for fighting and the Court finds this to be a legitimate, non-retaliatory reason for Plaintiff's termination.

Thus, the trial court granted defendant's motion under MCR 2.116(C)(10).

This Court reviews motions for summary disposition de novo. *Waltz v Wyse*, 469 Mich 642, 647; 677 NW2d 813 (2004). A motion for summary disposition under MCR 2.116(C)(10) requires that the moving party specifically identify the issues that it believes contain no genuine issue as to any material fact. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Once that is done, the nonmoving party must then "set forth specific facts at the time of the motion showing a genuine issue for trial." *Maiden*, *supra* at 120; MCR 2.116(G)(4). Courts are to consider substantively admissible evidence that was actually provided in opposition to the motion. *Id.* at 121. "A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules." *Id.*

B. Analysis

Plaintiff alleges discrimination based on race and retaliation in violation of Michigan's Civil Rights Act, MCL 37.2101 *et seq*. MCL 37.2202 provides, in relevant part:

> (1) An employer shall not do any of the following:
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> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

A plaintiff may establish proof of discriminatory treatment in violation of the Civil Rights Act either by direct evidence or by indirect or circumstantial evidence. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 132; 666 NW2d 186 (2003). Here, plaintiff offers no direct evidence of discrimination, but instead argues that the fact that she was discharged for nearly eleven months after fighting with Benford gives rise to an inference of discrimination based on race or retaliation.

In an action alleging employment discrimination based on indirect evidence, the plaintiff must present a rebuttable prima facie case through proofs that would allow a factfinder to infer that the plaintiff was the victim of unlawful discrimination. *Sniecinski*, *supra* at 134. In Michigan, our courts have adopted the burden-shifting approach set forth by the United States Supreme Court in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Sniecinski*, *supra* at 133-134. Under *McDonnell Douglas*, a plaintiff can make a prima facie showing of discrimination by showing that (1) the plaintiff was a member of a protected class; (2) the plaintiff suffered an adverse employment action; (3) the plaintiff was qualified for the employment position; and (4) the action taken by the defendant gives rise to an inference of unlawful discrimination. *Hazle v Ford Motor Co*, 464 Mich 456, 463; 628 NW2d 515 (2001). A plaintiff has made a showing on the fourth element, for example, when the

plaintiff has presented proof that either the job was given to someone under circumstances that create an inference of unlawful discrimination or that the defendant treated the plaintiff differently from persons of a different class for the same or similar conduct. *Id*. at 468; *Meagher v Wayne State Univ*, 222 Mich App 700, 716; 565 NW2d 401 (1997).

Once a plaintiff has established a prima facie case, the burden shifts to the employer to state a legitimate, nondiscriminatory reason for the adverse employment action. If the employer articulates a legitimate, nondiscriminatory reason for the adverse employment action, the burden shifts back to the plaintiff to show that the employer's reason is merely a pretext for discrimination. *Hazel, supra* at 463; *Wilcoxon v Minnesota Mining & Manufacturing Co*, 235 Mich App 347, 359; 597 NW2d 250 (1999), citing *McDonnell Douglas, supra* at 792.

Plaintiff's race discrimination claim fails as a matter of law. Even assuming that plaintiff established a prima facie case of race discrimination, defendant has satisfied its burden by showing a legitimate, nondiscriminatory reason for the adverse employment action. Plaintiff was discharged because she was involved in a physical altercation with a coworker in violation of defendant's Standards of Conduct. Although there is some dispute with respect to who instigated the altercation, there is ample evidence that plaintiff was indeed involved in the fight with Benford while at work and that plaintiff was discharged as a result. Defendant, therefore, articulated a legitimate, nondiscriminatory reason for the adverse employment action, and plaintiff has presented no evidence to show that defendant's reason is pretextual. *Hazel, supra* at 463; *Wilcoxon, supra* at 359, citing *McDonnell Douglas, supra* at 792.

Plaintiff's argument that the fact that her grievance procedure took nearly 11 months before she was reinstated supports her cause of action is without merit. Plaintiff's grievance procedure and subsequent reinstatement was delayed because of negotiations for a new labor contract between defendant and plaintiff's union, and because Fokken left his position with defendant and was not replaced for several months. Further, before the contract negotiations concluded, nearly 100 termination grievances were outstanding, many of which took approximately ten months for reinstatement.

Defendant, therefore, has stated a legitimate, nondiscriminatory reason for the delay in reinstating plaintiff. *Hazel, supra* at 463. Plaintiff has failed to produce any evidence that the stated reasons for plaintiff's discharge and delay in securing reinstatement were merely pretext for discrimination. Thus, summary disposition of plaintiff's race discrimination claim was proper as a matter of law. MCR 2.116(C)(10).

With respect to plaintiff's argument that she was discharged in retaliation for opposing discrimination under the Civil Rights Act, MCL 37.2701(a), plaintiff must prove (1) that she engaged in a protected activity, (2) that defendant knew that she engaged in a protected activity, (3) that defendant took an employment action adverse to plaintiff, and (4) that a causal connection exists between the protected activity and the adverse employment action. *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 310-311; 660 NW2d 351 (2003). Protected activity includes opposing a violation of the Civil Rights Act, making a charge under the Civil Rights Act, filing a complaint under the Civil Rights Act, or participating in an investigation, proceeding, or hearing under the Civil Rights Act. MCL 37.2701(a); *Barrett v Kirtland Community College*, 245 Mich App 306, 318; 628 NW2d 63 (2001).

Plaintiff has not shown a causal connection between the filing of her complaints against defendant and her discharge. The fact that an adverse employment action temporally follows the filing of a complaint under the Civil Rights Act does not establish causation. "Something more than a temporal connection between protected conduct and an adverse employment action is required to show causation where discrimination-based retaliation is claimed." *West v Gen Motors Corp*, 469 Mich 177, 186; 665 NW2d 468 (2003). Further, "the plaintiff must show that his participation in activity protected by the Civil Rights Act was a 'significant factor' in the employer's adverse employment action, not just that there was a causal link between the two." *Barrett, supra* at 315. Here, as discussed, plaintiff was discharged for fighting at work, not because of her prior complaints against defendant. Further, plaintiff fails to show that Fokken, the individual who decided to discharge her, had knowledge of her previous complaints. Thus, summary disposition of plaintiff's claims under the Civil Rights Act was proper as a matter of law.

III. STATUTE OF LIMITATIONS

Defendant also argues that the trial court should have granted summary disposition because plaintiff failed to commence her action within the applicable limitations period. However, an issue is not properly preserved for appellate review if it has not been raised before and decided by the trial court. *Polkton Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). In the instant action, the trial court did not rule on plaintiff's statute of limitations issue, but rather granted defendant's motion for summary disposition based on plaintiff's failure to provide evidence of wrongful termination. Thus, the statute of limitations issue was not properly preserved for appeal.

Affirmed.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Bill Schuette